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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 LILLIAN FIGUEROA, an individual,

8 Plaintiff,

9 v.

10 BNSF RAILWAY COMPANY, a  
11 foreign corporation,

12 Defendant.

NO. 4:17-CV-5096-TOR

ORDER DENYING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
PLAINTIFF'S CROSS-MOTION FOR  
SUMMARY JUDGMENT

13 BEFORE THE COURT are Defendant's Motion for Summary Judgment  
14 (ECF No. 48) and Plaintiff's Cross-Motion for Summary Judgment on Defendant's  
15 Defense of Statute of Limitations (ECF No. 66). These matters were submitted for  
16 consideration without oral argument. The Court has reviewed the record and files  
17 herein, and is fully informed. For the reasons discussed below, Defendant's  
18 Motion for Summary Judgment (ECF No. 48) is **DENIED** and Plaintiff's Cross-  
19 Motion for Summary Judgment on Defendant's Defense of Statute of Limitations  
20 (ECF No. 66) is **GRANTED**.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
AND GRANTING PLAINTIFF'S CROSS-MOTION FOR SUMMARY  
JUDGMENT ~ 1

## BACKGROUND

This case concerns a claim under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, by Plaintiff Lillian Figueroa against Defendant BNSF Railway Company, a foreign corporation incorporated in Delaware. ECF No. 44 at ¶¶ 1-2. In the instant motion, Defendant seeks summary judgment on Plaintiff's claim, arguing that Plaintiff commenced this action after the expiration of the applicable statute of limitations. ECF No. 48 at 5. Plaintiff filed a Cross-Motion for Summary Judgment, asserting that the circumstances of this case make equitable tolling appropriate. ECF No. 66 at 26.

## FACTS

On May 29, 2012, Plaintiff was injured while performing work at Defendant's Pasco Diesel Facility in Washington. ECF No. 44 at ¶ 3. On May 22, 2015, Plaintiff filed suit in the Circuit Court of the State of Oregon for Multnomah County. ECF Nos. 44 at ¶ 9; 66 at 14; 86 at 8. Defendant filed a motion to dismiss for lack of personal jurisdiction, which was denied. ECF Nos. 44 at ¶¶ 10, 14; 48 at 6-7; 66 at 14-15; 86 at 9. On February 26, 2016, Defendant filed a Writ of Mandamus with the Oregon Supreme Court. ECF No. 44 at ¶ 16. The Oregon Supreme Court allowed the petition and heard oral argument on November 10, 2016. *Id.* at ¶ 17. On March 23, 2017, the Oregon Supreme Court issued a Peremptory Writ of Mandamus and Appellate Judgment, instructing the Circuit

1 Court judge to vacate his prior order denying the motion to dismiss and conduct  
2 further proceedings consistent with the decision of the Oregon Supreme Court.  
3 ECF Nos. 44 at ¶ 19; 48 at 8; 66 at 15; 86 at 9. On July 7, 2017, the Circuit Court  
4 judge signed an Order and a Judgment involuntarily dismissing the matter for lack  
5 of personal jurisdiction, which was entered on July 11, 2017. ECF No. 44 at ¶¶ 23-  
6 24; 66 at 15; 86 at 9.

7 On July 12, 2017, Plaintiff filed a Complaint in this Court. ECF No. 1. On  
8 August 7, 2017, Defendant filed a Motion to Dismiss, arguing that Plaintiff's claim  
9 was time barred by the applicable three-year statute of limitations (45 U.S.C. § 56)  
10 and that equitable tolling was not appropriate due to Plaintiff's alleged forum  
11 shopping. ECF No. 6 at 1-2. The Court denied Defendant's Motion, finding that  
12 Plaintiff could prove a set of facts establishing that the action was timely. ECF No.  
13 14 at 7.

14 On December 12, 2017, Defendant filed a Motion to Bifurcate the equitable  
15 tolling issue for trial, which the Court granted. ECF Nos. 25, 34. On March 19,  
16 2018, a status conference was held at the request of the parties. ECF No. 43. The  
17 Court granted Plaintiff's Motion to Amend the Complaint and ordered Defendant  
18 to file the instant motion for summary judgment regarding the equitable tolling  
19 issue. ECF No. 43. On March 20, 2018, Plaintiff filed an Amended Complaint.  
20 ECF No. 44.

## DISCUSSION

### A. Standard of Review

Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). For purposes of summary judgment, a fact is “material” if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is “genuine” where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* The moving party bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *Anderson*, 477 U.S. at 256.

In ruling on a motion for summary judgment, the court views the facts, as well as all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The court must only consider admissible evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). There must be evidence on which a jury could reasonably find for the plaintiff and a “mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*, 477 U.S. at 252.

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1           **B. Equitable Tolling of the Statute of Limitations**

2           The equitable tolling doctrine “enables courts to meet new situations [that]  
3 demand equitable intervention, and to accord all the relief necessary to correct ...  
4 particular injustices.” *Holland v. Florida*, 560 U.S. 631, 650 (2010) (internal  
5 quotations marks and citation omitted). “Generally, a litigant seeking equitable  
6 tolling bears the burden of establishing two elements: (1) that he has been  
7 pursuing his rights diligently, and (2) that some extraordinary circumstances stood  
8 in his way.” *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012)  
9 (internal quotation marks and citation omitted); *see also Menominee Indian Tribe*  
10 *of Wisconsin v. United States*, 136 S.Ct. 750, 755 (2016).

11           The first element requires the litigant to show she undertook “the effort that  
12 a reasonable person might be expected to deliver under his or her particular  
13 circumstances.” *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011). This  
14 diligence does not require “an overzealous or extreme pursuit of any and every  
15 avenue of relief.” *Id.* The second element requires the litigant to show that  
16 “extraordinary circumstances were the cause of his untimeliness ... and ... ma[de]  
17 it impossible to file [the document] on time.” *Ramirez v. Yates*, 571 F.3d 993, 997  
18 (9th Cir. 2009) (internal quotations marks and citations omitted).

19           Equitable tolling is appropriate when a “plaintiff has not slept on his rights  
20 but, rather, has been prevented from asserting them.” *Burnett v. New York Cent. R.*

1 Co., 380 U.S. 424, 429 (1985). Courts have “recognized the unfairness of barring  
2 a plaintiff’s action solely because a prior timely action is dismissed for improper  
3 venue after the applicable statute of limitations has run.” *Id.* at 430. When a  
4 plaintiff files a timely FELA action in state court, serves the defendant with  
5 process, and the case is then dismissed for improper venue, “the FELA limitation is  
6 tolled during the pendency of the state suit.” *Id.* at 434-35.

### 7 **C. Relevant Case Law**

8 The parties dispute whether the law was clear at the time Plaintiff filed suit  
9 in state court in 2015. The Court thus considers the relevant case law in 2015.

10 In *Daimler*, Argentinian residents filed suit under the Alien Torts Statute  
11 (ATS) in the Northern District of California against Daimler, a German public  
12 stock company, for conduct allegedly committed by an Argentinian subsidiary of  
13 Daimler in Argentina. *Daimler AG v. Bauman*, 571 U.S. 117, 120 (2014). The  
14 Supreme Court noted that the question is whether the corporation’s “affiliations  
15 with the State are so ‘continuous and systematic’ as to render [it] essentially at  
16 home in the forum State.” *Id.* at 139 (quoting *Goodyear Dunlop Tires Operations,*  
17 *S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Supreme Court held that there was  
18 no general jurisdiction because Daimler was not “at home” in California, and could  
19 not be sued for injuries plaintiffs attribute to the subsidiaries’ conduct in Argentina.  
20 *Id.* at 136.

1 In 2017, the Supreme Court specifically addressed the issue of general  
2 jurisdiction in regards to a corporation under FELA. *BNSF Ry. Co. v. Tyrrell*, 137  
3 S.Ct. 1549 (2017). A North Dakota resident and South Dakota resident brought a  
4 FELA suit against BNSF in a Montana state court for injuries they sustained. *Id.* at  
5 1554. Neither plaintiff was injured in Montana and BNSF was not incorporated  
6 nor had its principal place of business in Montana. *Id.* at 1559. The Montana  
7 Supreme Court held that it could exercise general jurisdiction over BNSF, finding  
8 that *Daimler* did not control because it did not involve a FELA claim or a railroad  
9 defendant. *Id.* at 1558. The Supreme Court reversed and, applying *Daimler*, found  
10 that the business BNSF did in Montana was not sufficient “to render [it] essentially  
11 at home” in Montana. *Id.* at 1559 (quoting *Daimler*, 571 U.S. at 136). The  
12 Supreme Court held that “FELA does not authorize state courts to exercise  
13 personal jurisdiction over a railroad solely on the ground that the railroad does  
14 some business in their States.” *Id.* at 1558.

15 Here, this Court previously found in denying Defendant’s Motion to Dismiss  
16 that it was not clear that *Daimler* concluded the issue of personal jurisdiction over  
17 a foreign corporation. ECF No. 14 at 6-7. This Court determined that the Supreme  
18 Court clarified the precise issue of personal jurisdiction by state courts under  
19 FELA in *Tyrrell*, which occurred two years after the Plaintiff filed her case in state  
20 court here. *Id.* at 7. The Court determined that Plaintiff may well be able to prove

1 that equitable tolling is appropriate given that the law may not have been clear  
2 when she filed her case in 2015. *Id.* The Court considers below whether the law  
3 was clear in 2015 so as to prevent equitable tolling.

#### 4 **D. Clarity of the Law in 2015**

5 Defendant argues that Plaintiff cannot prove that equitable tolling is  
6 appropriate because the law was clear when she filed her case in 2015. ECF Nos.  
7 48 at 12; 86 at 14-16. Defendant insists that the Supreme Court's decision in  
8 *Daimler* clearly precluded the Oregon Court's personal jurisdiction over BNSF for  
9 a case arising out of incidents that occurred in Washington. ECF No. 48 at 13.  
10 Defendant then asserts that Plaintiff chose to ignore *Daimler*'s clear rule and  
11 pursue her claims in Oregon for a Washington-based incident, which was  
12 unreasonable. *Id.* at 14-15. Defendant contends that Plaintiff chose the Oregon  
13 Court intentionally to gain a strategic advantage, and this is not a basis to support  
14 the application of equitable tolling. *Id.* at 16.

15 The Court disagrees and finds that the law was not clear when Plaintiff filed  
16 her case in Oregon. *Daimler* did not establish "an easy to follow rule" when the  
17 Supreme Court had to clarify general jurisdiction under FELA three years later.  
18 *See id.* at 13. While *Daimler* established the rule ultimately applied by the  
19 Supreme Court in *Tyrrell*, it did not conclude the issue of personal jurisdiction over  
20 a foreign corporation. *Daimler* addressed jurisdiction under the ATS, not FELA.



1 Though the Supreme Court ultimately found this distinction not persuasive, it was  
2 still unclear in 2015 whether *Daimler* applied to FELA cases and railroad  
3 defendants. *See Tyrrell*, 137 S.Ct. at 1558-59.

4 The Court finds that Plaintiff did not act unreasonably in filing suit in  
5 Oregon when the law was unclear whether *Daimler* applied to her suit in 2015.  
6 The Court is not persuaded by Defendant's contention that Plaintiff represented "it  
7 was appropriate to eschew *Daimler* and file in the wrong court for the purpose of  
8 gaining a strategic, financial advantage." ECF No. 48 at 15. At oral argument  
9 regarding the Motion to Dismiss, Plaintiff's counsel rebutted Defendant's alleged  
10 forum shopping label by explaining that it was cheaper to litigate in Oregon, which  
11 is meant to protect his client and does not constitute forum shopping. *See id.* at 14-  
12 15.<sup>1</sup> Defendant alleges that lawyers have a strong incentive to file claims in

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14 <sup>1</sup> Defendant claims that Plaintiff was forum shopping, inferring a negative  
15 connotation, by filing in Oregon. This is an inference the Court does not accept.  
16 As to the term "forum shopping", the Ninth Circuit observed, "[a] competent  
17 attorney, as part of his ethical obligation to represent his client with reasonable  
18 diligence, *see* Model Rule of Professional Conduct 1.3, is obligated to consider  
19 various fora and to choose the best forum in which to file a client's complaint."  
20 *Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 695 n.10 (9th Cir. 2009).

1 Multnomah County as the potential outcomes may be superior for plaintiffs. *Id.*  
2 Yet, these allegations, even if taken as true, do not mean that Plaintiff's decision to  
3 file her suit in Oregon when the law was unclear constitutes improper forum  
4 shopping. A decision to litigate in a cheaper forum for one's client is not  
5 unreasonable nor does it show that Plaintiff was attempting to eschew *Daimler* or  
6 purposefully file in the wrong court. Since the law was not clear at the time, it is  
7 unreasonable to allege that Plaintiff purposefully filed in the wrong court.

#### 8 **E. Applicability of Equitable Tolling**

9 The Court finds that there is no genuine question of material fact regarding  
10 the appropriateness of equitable tolling. First, Plaintiff establishes that she was  
11 pursuing her rights diligently. *See Credit Suisse Sec.*, 556 U.S. at 227. Before the  
12 three year statute of limitations, Plaintiff filed in state court and upon the dismissal  
13 of the state court claim, she immediately filed in federal court the next day.  
14 Second, her untimeliness in filing in this Court was due to the pending state court  
15 proceeding, which *Burnett* recognizes as a tolled time period. *See Burnett*, 380  
16 U.S. at 434-44. Plaintiff was then not sleeping on her rights, but actively pursuing  
17 her claim in state court. The Ninth Circuit has determined that a FELA action is  
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1 tolled during the pendency of the state suit.<sup>2</sup> *See id.* The lack of clarity regarding  
2 the applicability of *Daimler* for a FELA action in 2015 makes Plaintiff's conduct  
3 reasonable, as discussed above.

4 Under the second element of equitable tolling, Defendant emphasizes that  
5 the Supreme Court has left open the question of whether a reasonable mistake of  
6 law could be extraordinary.<sup>3</sup> ECF No. 86 at 11-12; *Menominee Indian Tribe*, 136  
7 S.Ct. at 756 n.3. In *Menominee*, the Tribe mistakenly relied on a class action to  
8 justify equitable tolling, but the Tribe failed to present its claims to Indian Health  
9 Services which made it ineligible to participate in the class action. *Id.* at 755. The

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10 <sup>2</sup> This Court does not find *Burnett* distinguishable where it dismissed for  
11 improper venue and the Oregon court here eventually dismissed for lack of  
12 jurisdiction. *Burnett*, 380 U.S. at 434-35.

13 <sup>3</sup> Defendant also asserts that Plaintiff does not discuss the element of  
14 extraordinary circumstances in her brief, and thus she forfeits the issue. *See* ECF  
15 No. 86 at 13 n.3. While the Court acknowledges that Plaintiff argues an outmoded  
16 standard for equitable tolling, the Court declines to find that Plaintiff essentially  
17 forfeits her equitable tolling claim as she extensively addresses reasonability in her  
18 brief, which is a factor to consider in the second element of extraordinary  
19 circumstance. *See* ECF No. 66 at 18-22, 26-30.  
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1 Supreme Court found that this mistake was a “simple miscalculation” and a  
2 “garden variety claim of excusable neglect.” *Id.* at 757 (citation omitted). The  
3 Supreme Court also noted in dicta that this situation was “quite different from  
4 relying on *actually binding* precedent that is subsequently reversed.” *Id.* (emphasis  
5 in original).

6 Yet, this Court finds that the law was unclear at the time of the suit, not that  
7 Plaintiff mistook the law. The Court here also need not decide whether a mistake  
8 of law is an extraordinary circumstance, but merely determines that the lack of  
9 clarity in the law creates an extraordinary circumstance. The situation here is then  
10 unlike *Menominee* because the Plaintiff did not make a simple miscalculation and  
11 misunderstand the law, but rather there was no clear law regarding jurisdiction for  
12 a FELA action until the Supreme Court’s decision in *Tyrrell*. The Tribe in  
13 *Menominee* did not suffer from lack of clarity in the law, but misunderstood the  
14 requirement of presentment in a class action. The Tribe made a mistake of law, but  
15 the Plaintiff here did not have a clear law on jurisdiction. While Plaintiff did end  
16 up misfiling in the wrong jurisdiction, she could not have known this until the  
17 *Tyrrell* decision. This Court is then not persuaded that lack of clarity in the law is  
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1 akin to a mistake of law to preclude equitable tolling.<sup>4</sup>

2 Accordingly, the Court finds that Plaintiff establishes there is no genuine  
3 issue of material fact regarding the applicability of the equitable tolling doctrine, as  
4 Plaintiff diligently pursued her rights and the lack of clarity in the law in 2015 was  
5 an extraordinary circumstance outside of her control. The Court then tolls  
6 Plaintiff's claim while it was pending in state court and finds that she timely filed  
7 her suit here.

8 **ACCORDINGLY, IT IS HEREBY ORDERED:**

9 1. Defendant's Motion for Summary Judgment (ECF No. 48) is **DENIED**.

10 2. Plaintiff's Cross-Motion for Summary Judgment on Defendant's Defense of  
11 Statute of Limitations (ECF No. 66) is **GRANTED**.

12 The District Court Executive is directed to enter this Order and furnish  
13 copies to counsel.

14 **DATED** June 5, 2018.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE  
Chief United States District Judge

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18 <sup>4</sup> As the Court finds that the facts of *Menominee* are not applicable to this  
19 case, the Court does not consider Plaintiff's argument regarding whether  
20 *Menominee* displaced other tests for equitable tolling. See ECF No. 93.